March 8, 1956

To His Excellency, the Governor
and the Honorable Council

Gentlemen:

You have requested that I summarize the most significant changes in the new campaign expenditures law (Laws 1955, chapter 273) and interpret the law insofar as possible in contemplation of forthcoming primary and election contests.

It should be clearly understood that this summary and interpretation in response to your Resolution of February 29, 1956, states merely the informal views of this office. In no sense is it nor can it be a formal opinion since the General Court did not specifically provide for advance interpretations by the Attorney General relative to Laws 1955, chapter 273. This is so for a further reason, namely that the new law is a criminal statute and while this informal opinion states the present view of this office toward administrative interpretation, it must be recognized that such informal statement does not preclude adoption of a contrary position in later investigation or enforcement if a particular case should then appear to warrant.

Formal opinions of the Attorney General are limited by existing law (RSA C. 7) to the request of either branch of the General Court (RSA 7:7) and/or advice to any State Board, Commission, Agent or Officer "... as to questions of law relating to the performance of their official duties ..." It is not perceived that any aspect of the present request is related to the performance of any known duties of the Governor and Council.

If violators act with the knowledge and consent of a candidate and he thus exceeds his ceiling limit, the Supreme Court, in a suit in equity brought by any person, is required to enter an order disqualifying the successful candidate if it finds such a violation with his knowledge and consent to have met the tenor of the opinion in Daniell v. Gregg, 97 N.H. 452. (RSA 70:17) Furthermore, the extraordinary relief in the Supreme Court now includes any violations relating to the primary, not merely publication of campaign expenditures, as was the situation under prior law.

The new law makes many changes all of which substantially narrow the effective range of lawful financial conduct on the part of a candidate or others in his behalf in either a primary or general election campaign. However, under the new law the ceilings of candidates' spending are raised in accordance with the tables attached. For example, for major political office a candidate for Governor (and others in his behalf) can spend in the primary up to $25,000; the same for the United States Senate, etc. (RSA 70:4) In determining whether a candidate has exceeded his lawful ceiling, the list of excepted expenditures has been substantially narrowed so that the only expenditures that do not count against the $25,000 are the candidate's contribution to the Senate Committee, his filing fee, and his expenditures for (his own) personal travel and subsistence. The ceiling set under the new law includes specifically ". . . all expenditures, contracts therefor and use of contributions of money or things of value, tangible or intangible, by a candidate or by others, including political committees, in his behalf and with his knowledge during the period of time he or others in his behalf, and with his knowledge, seeks votes for him to, and including, the date of the primary." In its initial definition of terms, the new law specifically excludes the services of volunteers who received no pay from the phrase "thing of value." Thus it is clear that "things of value" was intended by the Legislature to include personal services paid for by candidates or by others in his behalf and with his knowledge.

As will be readily seen from the foregoing quotation the calendar year of the primary no longer limits expenses accountable toward the appropriate ceiling but all expenses made in the process of "seeking votes" are chargeable. Just when this starts is a question of fact in each case. It is completely impossible for me to render an interpretation which can answer that which the General Court has left unanswered. If this be considered a "political thicket"

which the General Court might lawfully have entered, it has not seen fit to do so. (Cf., Colegrove v. Green, 328 U.S. 549 (1946)) The restrictions of the law are applicable to any activity seeking votes. Obviously, to seek votes one must be or have a candidate who in turn may have become such prior to or after the beginning of the calendar year of the primary. An incumbent is not necessarily a candidate merely because he is an incumbent, whether he is a Congressman serving but a two-year term in office or a Senator who serves six years. Not all expenditures by nor contributions to incumbents are chargeable under this law. They must first be found to have been made during that period when the aided individual "seeks votes" which must remain a question of fact in each case. Furthermore, legal principles of the law of agency are still involved. Daniell v. Gregg, 97 N.H. 452 (1952)

By excluding volunteers who receive no pay there is indication of legislative intent to include the fair value of services of paid employees which, of course, would include the salaries of a candidate's employees or the value of the services of paid employees of others loaned to a candidate or employed by an incumbent-candidate or by others in his behalf including committees, either state or federal, or purely political, to the extent that such paid employees are actually working "seeking votes" for the candidate.

In this connection, expenditures for maintenance of offices by incumbent Members of Congress, including stationery, postage, writing or printing, telegraph and telephone, as well as salaries of regularly employed personnel, are not chargeable to the extent these services are performed as part of the ordinary functions of the office and not in campaigning seeking votes for a candidate. Many incumbents are required to maintain regular local offices and personnel in the performance of their duties. If a paid employee is employed during the day and puts in his full time during the day in the course of the routine duties of such an office regularly devoted to an incumbent's many duties of public representation, his attendance upon a political function with the candidate-incumbent in the evening or his work beyond office hours in political behalf, without additional compensation, would not, in my opinion, require allocation of any part of his salary as chargeable against his candidate's campaign limitation. At the same time, to the extent any part of his regular paid day's work or any other paid time is devoted to seeking votes in behalf

of a candidate, the fair and proportionate value of his services for that time is chargeable to that candidate under the new law.

Stated succinctly, the rule of the new law is that all paid employees, whatever the source of their compensation, who work in behalf of a candidate seeking votes, render that portion of their salaries as well as their other expenditures including but not limited to their travel and subsistence attributable to the time spent in this occupation chargeable to the candidate involved if they work in his behalf with his knowledge and authorization, express or implied. (See, Daniell v. Gregg, 197 N.H. 452, 455 [1952]. Thus, for example, an employee of a congressional committee as well as a congressional or senatorial personal staff member moving in New Hampshire in behalf of a candidate (whether or not an incumbent) in organizational work, campaign work, or other political activity, as distinct from employment in regular duties of his office (which it is to be remembered is itself political in nature and offering continuous political service to his constituency) will render his salary for that period chargeable to the candidate in whose behalf he is operating.

It should be noted that the requirement of prior law that paid political agents first register with the Secretary of State (R.L., c. 42, s. 25) has been eliminated.

Members of Congress have available to them the franking privilege for distribution of mail matter upon official business (Title 39, U.S.C.A. Sec. 327). Clearly the franking privilege is not permitted by federal law for purely political campaigning as distinct from official business, yet the determination of whether specific matter is frankable is for the Postmaster General and not within the authority of a State Legislature. Should such material be believed by the trier of fact in New Hampshire to be purely political the ruling of a federal official would not preclude chargeability under the terms of the new New Hampshire law. Nothing in such a situation relating to a primary is contrary to known existing federal laws. Whether the amount chargeable in such a case would include the value of first class postage had stamps been affixed to such franked mailing is open to considerable question, inasmuch as the incumbent-candidate did not make an expenditure for stamps and to charge him with the equivalent would require a rule of thumb of "fair value" for "things of value"

as that phrase is used in RSA 70:4, I. In any event, it is believed inappropriate if not impossible in this informal opinion to seek to classify as chargeable or non-chargeable, franked mailings from incumbents to addressees in this State. Each such mailing must stand on its own two feet and until it is born the General Court has furnished no standard in the present law to enable its prospective classification beyond that referred to in the above underlined formula.

It should be observed at this point that the Federal Corrupt Practices Act (present Federal law) (43 Stat. 1073) does not apply to a primary (Title 2, U.S.C.A. Sec. 241), and further, that even to the extent applicable to the general election that by its own terms it saves and continues provisions of state law "unless directly inconsistent with the provisions of this chapter . . . " (Title 2, U.S.C.A. Sec. 254). Not extending to our primary, no inconsistency between state and federal law relating thereto is possible, by definition, and inconsistencies, if any, relating to the general election must yield to federal law. The Federal Corrupt Practices Act expressly requires that a candidate not make expenditures in excess of the amount which he may lawfully make under the laws of the state in which he is a candidate. (Title 2, U.S.C.A. Sec. 248). This is a field in which the federal government might lawfully supersede any state legislation (U.S. Constitution, Art. I, Sec. 4, 5) but it has not done so except as to inconsistencies. Even the Hatch Political Activities Law (Federal) applies only to employees in the executive branch of the federal government and not to employees of the Congress. (53 Stat. 1148; 5 U.S.C. Sec. 118.i)

The new law specifically prohibits corporations and labor unions or officers or agents thereof from making any contributions, gifts or payments of money or anything of value in behalf of a candidate, party or measure. (RSA 70:2, II) They may not lawfully do this even with his consent. The same thing is true of contributions, etc. from employees in the state classified service, their spouses or children.

Under the new law no person may contribute more than $5,000, or its equivalent in value other than the candidate himself. (RSA 70:2,V) No one may lawfully contribute anonymously

nor under an artificial name (full names and post office addresses are required). (RSA 70:5) No one may lend money to a candidate and take a note therefor unless it is a genuine loan. (RSA 70:2,V) No one may make any payment of money or thing of value that is in any manner concealed, which means clearly that any payment or contribution of either money or a thing of value without the knowledge and written consent of the candidate or his fiscal agent is unlawful and prohibited unless it is to a political committee or its treasurer. (RSA 70:2,V) Publishers of newspapers, periodicals, or vendors of billboard space or operators of radio or television stations are prohibited from publishing, printing, or broadcasting any political advertising from any source whatever unless such advertising is signed by the candidate or his fiscal agent or has first been authorized in writing by one of them. (RSA 70:14, III)

One of the questions existing under the prior law was how far political committees might act in behalf of a candidate, spend money for a candidate, or contribute things of value in behalf of a candidate and then not report until after the primary and avoid chargeability to their candidate. This loophole has been plugged by the present statute for the reason that no political committee in a primary may now lawfully make <u>any</u> political expenditure without prior written consent of the candidate supported by the committee or the consent of his fiscal agent (RSA 70:4, III) and if the committee organized to support a candidate, before it receives or spends any money or thing of value (RSA 70:8). It should be emphasized that in the general election this restriction is not applicable to the state committee of any party (RSA 70:8).

Publication of contributions and expenditures by reports from major candidates under oath with the Secretary of State is now required on the Wednesday preceding the primary rather than Friday preceding the primary from each candidate and/or his financial agent. (RSA 70:5, 6)

All other political committees (which would include special committees in behalf of candidate X) at either a primary or in a general election, which have spent more than $200 are re-

quired to file on the Wednesday preceding, and also on the second Friday after such primary or election. Such written consents are also required to be then immediately filed with the Secretary of State. (RSA 70:8) In the case of political committees spending less than $200, reports are not required until the second Friday after the primary election. (RSA 70:9)

In the Daniell v. Gregg case, social activities played a prominent part in a complaint by Mr. Daniell. These have been disposed of in the new law by simply providing that if at any outing, dinner or social affair each person attending pays the sum approximating closely the cost of the affair shall not be chargeable. (RSA 70:10) In this connection it seems reasonably clear that the Legislature intended to include liquor and/or beer in the phrase "sustenance or entertainment."

Complaints are authorized by any voter as well as any candidate and they shall be made to the Attorney General and set forth the violation alleged to have taken place. (RSA 70:16) It is worthy of note that such complaints, confidental under prior law (R.L., c. 42, s. 11) no longer have that status. The Attorney General is given the power to subpoena witnesses and to take testimony under oath in the investigation of complaints of violations of the Act. (RSA 70:16, IV)

It is the Attorney General's duty to investigate the complaint in every case which may or may not extend to the taking of testimony under oath. The Attorney General is given authority to employ either another county solicitor or an attorney, not a county solicitor, who might or might not be an Assistant Attorney General, and it is provided that his reasonable expenses shall be paid by the state on warrant of the Governor and Council. (RSA 70:16, III) Penalties for violation of any provision of the new law are, in the discretion of the Court, either a fine of not more than $1000 nor less than $100 or imprisonment for not more than six months nor less than thirty days, or both.

There are other details of lesser importance in the new law but I would simply observe that this new law is a drastically stringent measure. While it appears on its face to raise

the permissible limits of spending by candidates or others in their behalf, it actually substantially restricts both candidates and political committees, considering the cost of television and its importance in the current political scene and its inclusion of the formerly unrestricted expenditures for stationery, postage, printing, telephone and telegraph, etc. (Cf. R. L., c. 42, s. 4) If a candidate employs volunteer workers exclusively he is entitled to their services which will not count against his ceiling. However, if he employs workers or paid agents or if any other person or political committee does in his behalf, the candidate prima facie is chargeable, because under the new law they may not work for him or in his behalf without his prior written consent or that of his fiscal agent. However, "by or in behalf of" a candidate has been construed by the New Hampshire Supreme Court to be the equivalent of expenditures made with the authorization of the candidate, express or implied, and not those made unlawfully by others without such authority. Daniell v. Gregg, 97 N.H. 452, 455 (1952).

That portion of the statute which contemplates proceedings in the Supreme Court of New Hampshire looking toward disqualification of a candidate now includes any violation of any of the provisions of RSA, chapter 70, relating to the primary (as distinct from confinement to violations of the publication requirements under the prior statute. (Cf., R.L., c. 42, s. 20) If the Supreme Court finds these violations to have been, in the language of Daniell v. Gregg, 97 N.H. 452, 456, "serious and deliberate" (which basic judicial reasoning is very probably also applicable to the new law which for such purposes is substantially similar to the old) there must result a decree ordering the candidate's name off the ballot, opening the way to a filling of the vacancy thereby created as provided by law.

It is believed that the foregoing opinion answers all of the questions asked to the maximum extent possible in advance of specific factual cases. Such questions as those involving a determination of whether certain contributions or expenditures are chargeable must turn on the question of fact which must first be determined in each individual case, namely, when does an individual, whether or not an incumbent, become a candidate, and was the expenditure made

"during the period of time he or others in his behalf and with his knowledge seeks votes for him....."? An incumbent is not necessarily a candidate for reelection from the day he is sworn in. At some point along his term he becomes one - not necessarily until he announces but certainly when activity of the type specified by the above-quoted formula commences. The General Court of this State has given this formula the force of law and the yardstick of advance interpretation cannot change it from a question of fact in each case, for ultimate determination by the Court.

Respectfully,

Louis C. Wyman
Attorney General

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